FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, AMERICAN SAFETY TABLE COMPANY, prays that a writ of *certiorari* issue to the United States Court of Appeals for the Third Circuit for the review of the order of said Court, entered on July 6th, 1948. *American Safety Table Company* v. *Singer Sewing Machine Company,* 169 Fed. (2d) 514 (not officially reported).

The order was entered on the application of Singer Sewing Machine Company, the respondent, praying for recall of the mandate of the Circuit Court of Appeals issued October 17th, 1938, which had sustained petitioner's appeal from the dismissal of its patent infringement suit against respondent, and praying for a reargument of that appeal. The princi-

pal ground asserted by Singer Sewing Machine Company in support of its application was the disqualification of the late J. Warren Davis, one of the Judges who heard the appeal, because of corruption said to have occurred in another earlier case (*Root Refining Co.* v. *Universal Oil Products Co.*, 78 Fed. (2d) 991, procedure to vacate mandate reviewed 328 U. S. 575, hereinafter called the *Root* case), in which neither this petitioner nor the respondent were parties and which had been argued before the Circuit Court and decided by it some time before the argument of the appeal in this case. In its petition, Singer Sewing Machine Company asked only for reargument of the appeal before a competent tribunal. Singer relied entirely on the White report (see 328 U. S. 575 at 580) regarding the relationship between Kaufman and Davis. That relationship was disclosed in the *Root* case and it was not until the White report became public that Singer moved for reargument in this case.

The petition did not charge any wrongdoing on the part of American Safety Table Company and relied entirely on the findings of the Special Master in the *Root* case concerning an illicit agreement between Judge J. Warren Davis and a lawyer, Morgan S. Kaufman.

No wrongdoing on the part of American Safety Table Company has ever been alleged in this proceeding and the allegations and proof have shown only the following:

That the petitioner did retain Morgan S. Kaufman as one of its attorneys on its appeal to the Circuit Court and that J. Warren Davis was one of the Judges who heard that appeal and that in other cases

not at all related to this case there had been a corrupt understanding between Davis and Kaufman.

Testimony was given as to the fact of hiring and the legitimate reasons therefor, and no contradictory testimony was received. Nevertheless, the Circuit Court found that Kaufman had been hired by the petitioner for the sole purpose of employing his personal intimacy and influence with Judge Davis.

The respondent had asked only for opportunity to reargue the appeal before an impartial court. The Court below has not only recalled the mandate but has ordered that the petitioner's patent case be dismissed without any reargument.

Jurisdictional Statement

Jurisdiction of this Court is invoked under 28 USC 1254(1) (formerly Section 240 (a) of the Judicial Code, as amended by Act of February 13th, 1925). The order, of which review is sought, was entered on July 6th, 1948. The time of the petitioner to file this petition was extended to December 1st, 1948, by order of Justice Burton, entered on the 10th day of September, 1948.

Summary and Short Statement of the Matter Involved

In this case, the Circuit Court of Appeals has vacated its own decree entered almost ten years previously, and has directed the District Court to dismiss the bill of complaint of your petitioner, American Safety Table Company. The Circuit Court has done this in the absence of any charges, testimony or any finding that the previous judgment in favor of your

petitioner was obtained by fraud upon that Court or that any one of the Judges of that Court had been influenced improperly by your petitioner or by Kaufman in this case.

Our matter, at the outset, is distinguished, therefore, from that of *Root Refining Company* v. *Universal Oil Products* (although both proceedings were tried together for convenience), since the Circuit Court in the *Root* case found that Judge Davis' action was influenced improperly by Kaufman in that case, that Kaufman was employed by Universal for that purpose and that the Stokley transactions were the means by which Judge Davis was compensated at least in part for his decision (Opinion, 169 Fed. (2d) 514 at 534).

Unlike the charges of corruption made in the *Root* case, here, no charge of fraud was made by the Singer Sewing Machine Company against your petitioner, American Safety Table Company, and the grounds for the petition are stated as follows:

> "That two of the three Judges who sat in this Court to hear argument on appeal were disqualified as follows:—
>
> "(a) J. Warren Davis, because there existed between him and one Morgan S. Kaufman, of counsel for plaintiff herein, what the conclusion adopted by this Court in *Root Refining Company* v. *Universal Oil Products Company*, F. (2d), , 62 U. S. P. Q. 114, declared to be a 'corrupt and illicit combination to obstruct justice'; and
>
> "(b) Hon. Joseph Buffington, because of infirmities of old age and consequent reliance at

> the time in question upon J. Warren Davis as testified by Judge Buffington himself in one of the trials of William Fox, J. Warren Davis and Morgan S. Kaufman."
>
> (Document A, Petition for Recall of Mandate and Re-Argument, p. 2).

The "corrupt and illicit combination to obstruct justice" had been found by Special Master Thomas Rayburn White[1] in the *Root* case.

In a second supplement to its petition, Singer Sewing Machine Company charges that the third judge who sat on your petitioner's case, namely, Judge Johnson, was also disqualified by reason of his unfitness as appeared by a report of the House Committee of the Judiciary (Singer's Second Supplement to Petition for Recall of Mandate and Reargument, Document K, p. 2).

It was admitted that your petitioner had employed the attorney, Morgan S. Kaufman; all of the other innuendos contained in the Singer pleadings were fully answered by your petitioner in its Answer to the Petition for Recall of the Mandate and Reargument and in its Answer to the Singer Second Supplement to Petition (Documents C and L).

Because the petition did not allege any facts or any

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[1] The hearings before Special Master White were conducted prior to any charges being made against your petitioner, American Safety Table Company, and were conducted without its participation or knowledge and the Special Master did not consider the *American Safety Table Company* v. *Singer Sewing Machine Company* case at all and there was no evidence introduced before him with reference specifically to this case. Even the findings of Special Master White were, upon the comment of the Supreme Court in its review of the *Root* case, 328 U. S. 580, 66 S. Ct. 1176, stricken out by the Circuit Court on June 20, 1947, thereby leaving the Singer petition in our case without basis in fact.

charges of wrongdoing against American Safety Table Company, a motion to dismiss the petition and rule to show cause was made but never directly decided by the Court (Document O, Statement of Plaintiff-Appellant in Support of Motion for Discharge of Rule to Show Cause).

But the Court thereafter "visualized" this proceeding to be an investigation into the integrity of the Court and no longer a case or controversy between private litigants as appears most clearly from the minutes of the last hearing held on October 25, 1948 (pp. 20 to 24), and from the order of the Court subsequently entered upon applications of the parties for the allowance of costs and counsel fees (October 27, 1948 as amended October 29, 1948). At the hearing on October 25th, the Court said:

> "The proceeding in these cases which we had some years ago or more, were instituted originally at the instance of certain private parties, but the proceeding itself was undertaken and prosecuted as an investigation by the Court itself into the integrity of its own judgment" (pp. 20, 21—hearing of October 25, 1948).

Taking that view of the matter, the Court of its own motion, in an order dated April 6, 1948, framed questions for investigation which it chose to call "charges". No such "charges" had been presented by Singer in this proceeding and no factual bases had been alleged therefor.

Those so-called "charges" and their ultimate disposition by the Court are as follows:

> "(a) Whether Judge Davis' action in this case was influenced by any expectation of gain or

favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman."

Disposition—No finding.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, and also whether certain other transactions between Judge Davis and Morgan S. Kaufman in the period 1935 to 1938, allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice, and, if so, whether Judge Davis were disqualified from participation in the appeal in this case by virtue of that combination."

Disposition—No finding.

"(c) Whether Morgan S. Kaufman was employed or retained by American Safety Table Company in connection with this case, and, if so, whether the purpose of such employment or retainer was the expectation of American Safety Table Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with this case."

Disposition—Found.

"(d) Whether Judge Buffington, by virtue of his physical condition in 1938 and his reliance upon Judge Davis, was disqualified from participation in the appeal in this case."

Disposition—No finding.

"(e) Whether, in the light of the findings of the Committee on the Judiciary of the House of

Representatives in respect of Judge Johnson's conduct in office, Judge Johnson was disqualified from participation in the appeal in this case."

Disposition—No finding.

(169 Fed. (2d) 514: re issues p. 536, re disposition p. 541).

With regard to the issues "a", "b", "d" and "e", the Circuit Court states that in view of its opinion with regard to issue "c":

> ". . . there will be no need to consider whether or not in this case Kaufman actually succeeded in exerting an improper influence upon Judge Davis, or whether upon the evidence before us, excluding the testimony of Davis and Fox, the Stokley and Fox transactions were part of a corrupt and illicit combination between Davis and Kaufman or whether Judges Buffington and Johnson were disqualified in this appeal" (169 Fed. (2d) at 541).

Thus the sole finding against your petitioner is that Kaufman was employed with the "expectation" that he would exercise an improper influence on Judge Davis and that finding has been made in the absence of any evidence that your petitioner knew or had reason to know at the time it employed Kaufman that he was personally intimate with the Judge or could improperly influence him. The Circuit Court has swept your petitioner into this unfortunate situation because the Court has been led into the natural error of assuming that the scandal, which later became a matter of public record, was known to everybody, including petitioner, at the time Kaufman was employed here. On the contrary, at that

time Kaufman's relationship with Judge Davis was not a matter of public knowledge; no charges had been preferred against either of them; no indictment; no disbarment proceedings; Kaufman was practicing law, and Judge Davis was regularly sitting on the bench; the proceedings resulting in the investigation of the *Root* case had not been initiated.

Hence, in the absence of any proof of fraud or improper conduct on the part of this petitioner or that the mandate of the Court was actually influenced in this case by any of the matters alleged by Singer or otherwise, the Court below has assumed, as a basis for its finding, that your petitioner knew that Kaufman had an improper influence over Judge Davis, and based on this unproved assumption has therefore inferred an evil intent on the part of your petitioner as the only possible reason for Kaufman's employment. This assumption, and the inference drawn from this assumption, are contrary to the proven facts and in conflict with the evidence, to which we will refer, of Kaufman's legitimate contribution to your petitioner's litigation.

Briefly, the salient facts presented to the Circuit Court at the trial before it are as follows:

Your petitioner, on March 7th, 1937, had filed an appeal in the Circuit Court of Appeals for the Third Circuit from the adverse decision of the District Court for the Eastern District of Pennsylvania which had dismissed your petitioner's suit against the Singer Sewing Machine Company and held invalid its patented claims to an instantaneous mechanical clutch for sewing machines.

In the District Court, your petitioner employed Augustus B. Stoughton and E. S. W. Farnum, Jr.,

of Philadelphia, as counsel. For the opening brief filed October 18th, 1937, in the Circuit Court of Appeals, your petitioner continued Messrs. Stoughton and Farnum and your petitioner added the firm of Levinsohn, Neiner and Levinsohn, of New York.

Both your petitioner's President, Louis Frankel, and the inventor, Max Voigt, were dissatisfied with the Levinsohn Firm and with the opening brief in the Court of Appeals which your petitioner had seen (Minutes, Vol. 8, pp. 2589 and 2592). Louis Frankel asked Mr. Stoughton if he could recommend a lawyer and Mr. Stoughton told Mr. Frankel that he (Frankel) had better go out and do that himself, but that Stoughton would be glad to cooperate (Minutes, p. 2536). Therefore, Louis Frankel was on the lookout for additional counsel.

The following facts are quoted from the Summary of Evidence prepared and filed by the Court of Appeals.

> "In New York Louis Frankel stopped to see his brother, David Frankel. David asked Louis to accompany him to a meeting he had arranged with Murray Becker, William Fox's attorney, in the Waldorf-Astoria Hotel, and Louis agreed to do so. The Frankels had been engaged in a real estate venture on Long Island with Fox in the twenties. This enterprise had not been financially successful, and in 1932 a settlement between the parties was effected. Fox gave David Frankel $25,000 and David gave Fox a five-year note for this amount, endorsed by his brothers, Joseph and Harry Frankel (Summary, p. 2).

* * * *

"The meeting between David Frankel and Becker, which Louis Frankel attended on this visit to New York in October or November of 1937, had to do with Fox's claim against David on the $25,000 note.

"At the conclusion of this meeting, Becker asked Louis Frankel as to the status of the *Singer* case. Frankel replied that he had lost in the District Court, and that he had come to New York in order to retain good counsel. Becker suggested that he employ Morgan Kaufman, and told him that Kaufman was the receiver of the S. W. Strauss Company and had an office in New York (Summary, p. 3).

* * * *

"The day after Becker's advice to Frankel to employ Kaufman, Louis Frankel went to see Kaufman and told him that he desired to retain him as general counsel for American Safety in connection with the *Singer* case, and that he wanted Kaufman to retain good patent counsel to prepare a reply brief and to argue the case in the Circuit Court. Louis testified that he was very much impressed with Kaufman's status as receiver of the Strauss Company, and with the offices he maintained in connection therewith. A week or so later, Louis and Harry Frankel came up to see Kaufman in New York, and Kaufman told them at this meeting that he thought there was a good chance of winning the case, and that he would retain the best patent counsel available. It was agreed that Kaufman should receive 25 per cent of any sum recovered from Singer and that American would advance Kaufman $5,000 to cover the costs of the appeal and the reten-

tion of additional patent counsel. It was also agreed that the money advanced to Kaufman for these purposes was to be credited against his 25 per cent contingent fee in the event of a recovery. Louis Frankel also testified that Kaufman was to repay this money in the event that the appeal was unsuccessful.

"Subsequently, the Board of Directors of the American Safety Table on November 23, 1937, passed a resolution authorizing the employment of Kaufman and the advance payment of $5,000 to him" (Summary, p. 4).

The foregoing facts as to Kaufman's employment were established by the testimony of your petitioner's President, Louis Frankel, called by the *amicus curiae* and examined before the Court (Minutes, Vol. 8, pp. 2529 to 2605), by the testimony of Louis Frankel's brother, Harry Frankel, examined on request of the *amicus curiae* by deposition taken at Miami, Florida, and actually read into the record before the Court (Minutes, pp. 2711 to 2754), and by the testimony of Morgan S. Kaufman called by the *amicus* and examined before the Court (Minutes, pp. 2626 to 2686).

All the witnesses in your petitioner's case were called by the *amicus* because he had the express duty in this proceeding to present available evidence whether or not in support of the "charges" (Order of April 6, 1948 and Opinion 169 Fed. (2d) 514 at 520 and 537). The testimony of Louis and Harry Frankel was the only direct evidence adduced by the *amicus* on the essential question of what your petitioner knew about Kaufman when it employed him and what its purpose was in employing him.

Murray Becker, the New York attorney, was not

called by the *amicus* and no reason was given by him why Becker was not called. The failure of the *amicus* to call Becker was in spite of the fact that the *amicus* had requested, and had been given, permission to take Becker's deposition and had served notice on the parties that Becker's deposition would be taken. (See Notice of Time and Place of Taking of Depositions served on the parties March 25, 1948, and the order authorizing the taking of such depositions filed March 27, 1948 herein.)

The failure to call Becker as a witness under these circumstances can not support any inference that his testimony would have been unfavorable to your petitioner. The correct inference would be directly to the contrary.

In arriving at its adverse finding contrary to the direct evidence, the Court sought justification in the circumstantial evidence of what it termed the "setting" under which Kaufman was employed. (169 Fed. (2d) 514 at 538.) On review this Court will note that the circumstantial evidence supports the direct evidence and that what was done in the employment of Kaufman by your petitioner was not merely consistent with an entirely innocent interpretation of its action, but was also natural, and compelled by the circumstances in which your petitioner found itself.

Your petitioner, a small company, had been in competition with the Singer Sewing Machine Company, which is of world-wide size. Petitioner had made a complaint to the Federal Trade Commission about unfair competition conducted by Singer from which the petitioner was suffering (Minutes, Vol. 8, p. 2539). The well-known attorney, George Medalie of New York, had been consulted about a year before the trial of the patent case with regard to this unfair competition and Mr. Medalie

had stated that he wanted $25,000.00 to handle the petitioner's grievances against Singer (Minutes, p. 2539).

Your petitioner was defeated in the District Court by the Singer Sewing Machine Company in the patent litigation. Petitioner's attorney, Mr. Stoughton, was in his late seventies and appearing in court less and less (Minutes, p. 2607). New counsel for the appeal, as well as counsel to supervise the unfair competition claim, were needed. Mr. Stoughton had professed that he could be of no help (Minutes, p. 2536). Mr. Otterbourg of New York, who was the family lawyer consulted from time to time on fiscal matters (Minutes, p. 2562) and not a member of a patent firm (Minutes, pp. 2563-2564), had advised your petitioner that as it was such a small company it was not in a position to pay the fees of counsel of equal prominence to that of Singer's (Minutes, p. 2595).

It was not until your petitioner had seen the main brief to be filed in the Circuit Court and was dissatisfied both with the brief and with the counsel it had then retained, that the urgent necessity for stronger counsel was presented. Mr. Kaufman was finally hired as general counsel in the case with regard to both the immediate patent appeal and litigation and with regard to the unfair competition (Minutes, p. 2538). The immediate setting, therefore, for his retention was the urgency of practically changing direction and counsel between the main brief and the reply brief and argument before the Circuit Court in the face of your petitioner's understanding that such new counsel would be very expensive and possibly beyond your petitioner's means.

Under these circumstances, no unfavorable infer-

ence can be drawn from the fact that your petitioner went to see Kaufman immediately upon the recommendation of Mr. Becker; nor from the fact that Kaufman was employed on a completely contingent retainer requiring only $5,000.00 for the immediate expenses of the Circuit Court argument; nor from the fact that Kaufman never undertook to handle the case alone but agreed to hire, within his original retainer agreement, the best patent lawyers available. As a matter of fact, after attempting to procure Senator George Wharton Pepper, Kaufman then procured the services of such masters in the patent field as the late Judge Haight and Mr. Samuel Darby of New York. Petitioner recognized the fact that neither it nor its other counsel could have retained such experts on such a favorable basis and on such short notice (Minutes, p. 2596). Any other inference, even if made at this late date, would be unrealistic.

The abstract of Kaufman's file (U. S. Exhibit No. 336), such of his letters as were quoted to the Court (Minutes, Vol. 10, pp. 3297 and 3300) and the testimony of the witnesses demonstrate that after Kaufman had procured the services of the patent counsel and after the favorable decision of the Circuit Court had resulted, your petitioner continued to rely upon Kaufman and to utilize his services. His retainer agreement was not exorbitant when judged either by the nature and details of your petitioner's claim against Singer or by the tentative award of the Special Master on the accounting (Minutes, Vol. 8, p. 2622).

Certiorari should be granted so that this Court may review the entire record. We feel confident that on such review it will develop that there was no evidence sustaining the order of the Court, and on the contrary

the positive evidence was all in favor of the innocence of American Safety Table Company.

Because your petitioner retained Kaufman, it has now been deprived of the judgment which it had obtained declaring that its patent was valid and infringed.

The decision was granted to your petitioner on March 19, 1938. (95 Fed. (2d) 543.) Petition by Singer for rehearing was filed and denied. Petition by Singer for *certiorari* to the Supreme Court was denied by this Court on October 10, 1938 (305 U. S. 622).

Six years thereafter, and, of course, well after the conclusion of the term at which the mandate was granted, the Singer Company filed, in the Circuit Court of Appeals, its Petition (dated September 26, 1944) for Recall of Mandate and Reargument of the Appeal (Document A), which opens with a statement that:

> "This is a petition by defendant-appellee for recall of the mandate and re-argument of the merits of this case."

The grounds for the petition (see p. 4 herein, *supra*) were entirely different from those on which the Circuit Court has finally acted. In any case, therefore, certainly the Court below has probably erred in dismissing petitioner's complaint (instead of merely granting a reargument) and thus forever depriving petitioner of a judgment declaring that its patent is valid and infringed and depriving it of its right to review an adverse decision of the trial court.

A certified transcript of the record of proceedings before the said Circuit Court of Appeals has been

furnished and your petitioner is moving this Court that for the purpose of this application the printing thereof be dispensed with.

Questions Presented

1. After the expiration of the term did the Circuit Court have power, on its own motion, to investigate its former judgment, in the absence of any charge or allegation of fraud, and enter its orders of June 20, 1947 and April 6, 1948?

2. Did the Circuit Court have power, after investigating the matter, to vacate its former judgment, in the absence of any charge, allegation or proof of fraud and enter its order of July 6, 1948?

3. Was there any evidence sufficient to sustain the conclusion of the court below that Kaufman was retained by the petitioner in the expectation that he would exercise or endeavor to exercise an improper influence on Judge Davis, and to sustain that Court's decision that the petitioner's complaint should be dismissed?

4. Did the Circuit Court have power to try, as a court of first instance, disputed questions of fact and to decide the dispute and on the basis of that decision to affect the property rights of your petitioner and dismiss its complaint?

5. On a motion for reargument of an appeal and upon an order to show cause issued by the Court itself why such reargument should not be granted, did the Court of Appeals err in not passing upon the motion

for reargument, and in place thereof, ordering judgment dismissing petitioner's complaint?

6. When on the Court's own initiative this proceeding became an "investigation" of "charges" framed by that Court, and the Court was no longer engaged in deciding a "case or controversy" between parties, was it beyond the constitutional power of the Circuit Court to enter an order dismissing petitioner's complaint?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Exercise of the power of this Court to grant the writ of *certiorari* is prayed for upon the following grounds:

1. The Court should review the findings and conclusions of the Court of Appeals, which has acted as a court of first instance, and the petitioner should be granted one review of the facts and law to which, from olden times, a litigant has been entitled as a matter of right.

2. This Court, being the only Court of review, should examine the evidence, and determine whether there is any support for the conclusions of the Court below.

3. The proceeding in this case was unprecedented, and important questions of jurisdiction of the Court of Appeals and procedure in matters of this kind are involved and the record should be reviewed by this Court.

4. The decision below adjudicates corruption on

the part of a former Judge of that court and the grave public importance of that decision and its undeniable effect on your petitioner's case requires its review by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Court directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in this case instituted by the petition of the respondent for the recall of said Court's mandate and for reargument; and further prays that the order of the Circuit Court of Appeals for the Third Circuit, entered July 6th, 1948, may be reviewed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

November 12, 1948.

AMERICAN SAFETY TABLE COMPANY,
By: LOUIS FRANKEL,
President.

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
Attorneys for Petitioner.

CHARLES A. HOUSTON,
FREDERIC P. HOUSTON,
GEORGE B. CLOTHIER,
Of Counsel.

Verification.

State of New York,
County of New York—ss.:

LOUIS FRANKEL, being duly sworn, deposes and says:

That he is President of American Safety Table Company, the petitioner named in the foregoing petition; that he has read the foregoing petition; that the same is true to the best of his knowledge, information and belief.

LOUIS FRANKEL.

Sworn to before me this
12th day of November, 1948.

STANLEY H. SCHINDLER
Notary Public, State of New York
N. Y. Co. Clks. #2558
My Commission Expires Mar. 30, 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

—against—

SINGER SEWING MACHINE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions and Orders Below.

The order of the Circuit Court of Appeals, Third Circuit, of which review is sought, was entered on July 6, 1948, and is filed in this Court on certificate of the Clerk of the Court below.

The opinion of the Court of Appeals is reported in 169 Fed. (2d) 514.

The order sought to be reviewed was preceded by an order of the Court of Appeals dated June 20, 1947, directing the petitioner to show cause why the mandate should not be recalled and the cause returned to the argument list. This was followed by an order of that Court entered April 6, 1948, consolidating this case with the *Root* case to a certain extent and setting

forth the charges that were to be tried. The two foregoing orders have also been certified to this Court by the Clerk of the Circuit Court of Appeals as part of the record in this case.

The order of the Court of Appeals filed October 27, 1948, passing on the question of costs and allowances in this proceeding, is filed with this Court by express permission of the Court of Appeals.

Jurisdiction.

The facts supporting the jurisdiction of this Court are set forth in the petition.

Such jurisdiction is invoked under 28 USC 1254(1) (formerly Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925).

Statement of Facts.

The facts are sufficiently set forth in the petition.

Specification of Errors.

If the writ is granted, petitioner will urge that the Court of Appeals in the instant proceeding erred in the following respects:

1. In investigating, on its own motion, its former judgment, in the absence of any charge or allegation of fraud, more than six years after the expiration of the term and entering its orders of June 20, 1947 and April 6, 1948.

2. In sitting as a court of first instance and hearing conflicting evidence and deciding disputed ques-

tions of fact and entering its order of July 6, 1948, dismissing the complaint.

3. In deciding that there was evidence sufficient to sustain the conclusion that Kaufman was retained by the petitioner in the expectation that he would exercise or endeavor to exercise an improper influence on Judge Davis, and to sustain the Court's decision that the petitioner's complaint should be dismissed.

4. In vacating its former judgment in the absence of any charge, allegation or proof of fraud and entering its order of July 6, 1948.

5. On a motion for reargument of an appeal, and upon its own order to show cause why such reargument should not be granted, in failing to pass upon the motion for reargument and in place thereof on July 6, 1948, ordering judgment dismissing petitioner's complaint.

6. When, on its own initiative, it changed this proceeding into an "investigation" of "charges" framed by the Court, and it was therefore no longer engaged in deciding a "case or controversy" between parties, the Court erred in going beyond its constitutional power (Article III Section 2) by entering its order of July 6, 1948, dismissing petitioner's complaint.

POINT I.

The Court should review the findings and conclusions of the Court of Appeals, which has acted as a court of first instance, and the petitioner should be granted the one review at least of the facts and law to which a litigant, from olden times, has been entitled.

The matter was tried by the Circuit Court as a court of first instance. Witnesses were examined, facts were decided and conclusions of law drawn by that Court and substantial rights determined. There is no procedure by which a review can be had of the findings of fact or conclusions of law except by *certiorari* issued out of this Court.

Throughout the early history of the common law, the necessity for the correction of errors by some other Court than that which passed upon the case was recognized and, as early as the Second Statute of Westminster (1285), Parliament was implementing with a "bill of exceptions" from the trial court the already established "writ of error" from the reviewing court.

> Theodore Plucknett, "A Concise History of the Common Law", 3rd Ed., page 29.

The evolution in the law of that time of a recognized "procedure in error" is traced by Pollock and Maitland in Volume II of their "History of English Law" (1895) at pages 661 to 665 and Roscoe Pound, in his volume "Procedure in Civil Cases" in the section on "Procedure in the King's Bench on Error to the Common Pleas, etc." published under the au-

spices of the National Conference on Judicial Councils, has summarized the history at page 47 as follows:

> "The writ of error * * * was grantable in all cases except treason and felony *ex debito justitiae*, as a matter of right."

The New York Court has said in *Yates* v. *People*, 6 Johnson 337, at p. 364, by Senator Clinton, speaking for the majority:

> "Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved."

And from the same case, page 456:

> "In order to guard against the fallibility of the human understanding, and to shield the citizen from the attacks of injustice, it may be regarded as a cardinal principle in our laws, that no single tribunal is intrusted with the sole determination of a man's property."

In an early case in the State of Maryland, the Court said:

> "It has always been regarded here, as well as in England, as a constitutional right of every citizen to have his case reviewed, in one form or other, by a court of error. * * *
>
> "This right of appeal seems to have been conceded to the citizen by the common law, in all civil cases, without check, or control of any kind whatever. A writ of error was granted, on demand, as a matter of right." *Ringold's Case*, 1 Bland (Md) 5, at page 7.

The late Chief Justice Taft of this Court, in requesting general statutory limitation of the right of appeal from the Circuit Court, wrote to Senator Copeland on December 9, 1924, as follows:

> "The theory of our system is a correct one, namely, that the district court and the circuit court of appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance. *The appeal to us should not be based on the right of a litigant to have a second appeal*" (Congressional Record, February 3, 1925, page 2920, italics ours).

Senator Cummins, moving the legislation for passage, stated:

> "It will be remembered that any case that reaches the circuit court of appeals has already been tried in the district court of the United States, * * * and it is believed, I think, by most people who have examined the subject, that when a litigant has had an opportunity to try his case *in two courts,* * * * any further appeal or review of the case ought to be in the discretion of the Supreme Court of the United States, and not a matter of right with the litigant" (Congressional Record, January 31, 1925, page 2752, italics ours).

After the passage of the Act of February 13, 1925, the late Chief Justice Taft explained the legislation and stated:

> "The sound theory of that Act (March 3, 1891) and of the new Act (February 13, 1925) is that

litigants have their rights sufficiently protected by a hearing or trial in the court of first instance and by one review in an immediate appellate Federal Court" (The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale Law Journal 1, at 2).

Chief Justice Taft was expressing what has always been taken for granted, namely, that each litigant shall have the right to at least one appellate review of the findings of fact and conclusions of law decided against him. Ordinary litigation, therefore, which originates in the District Court is safeguarded by one review as a matter of right in the Court of Appeals.

In the present case, however, the proceeding originated in the Circuit Court, and it was tried there, while the writ of *certiorari* can issue from the Supreme Court solely as a matter of judicial discretion. We contend that this discretion should be exercised in favor of this litigant in order that there shall be at least one review of the result of that litigation.

Whatever the rule may be in criminal cases, the right of one review in civil cases has not, so far as we have been able to find, ever been questioned, unless interdicted by some controlling statute. The propriety of one review has been taken for granted by this Court.

McLish v. *Roff*, 141 U. S. 661;
Ex Parte Bigelow, 113 U. S. 328.

In the *McLish* case, this Court said:

"From the very foundation of our judicial system, the object and policy of the acts of Congress in relation to appeals and writs of error,

(with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it, decided in a single appeal" (141 U. S. 661 at p. 665).

In *Ex Parte Bigelow,* the Court said:

"No appeal or writ or error in such case as that lies to this court. The act of Congress has made the judgment of that court (Supreme Court of the District of Columbia) conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain" (113 U. S. 328 at 329).

One review as of right in ordinary litigation has universally been provided by legislative action in Anglo-Saxon jurisprudence. We cannot argue, in this extraordinary case, that the petitioner has the absolute right of one review of the adverse decision of the Circuit Court, but we can follow the age-old rule that unless there is at least one review, justice has not been done.

That review can be obtained in this case by the exercise of the judicial discretion of this Court in the granting of the petition for the writ of *certiorari* for which we respectfully ask.

POINT II.

This Court should review, in the interests of justice, the action of the lower Court in granting the drastic relief of a dismissal of the complaint, without charges of wrongdoing on petitioner's part and without evidence establishing such wrongdoing.

We shall not repeat the analysis of the evidence set forth in pages 3 *et seq.* of the accompanying petition. It should be sufficient to say that petitioner has been found guilty of retaining Kaufman for the sole purpose of using his personal intimacy with Davis to favor petitioner.

The "evil intent" with which petitioner employed Kaufman is emphasized and lies at the very foundation of all action taken by the Court against the petitioner.

The Court has assumed that petitioner knew of Kaufman's intimacy with Davis, but there is not a shred of evidence to that effect in the case; it was an unwarranted assumption.

The Court of Appeals, we contend by hindsight, has based its conclusion against your petitioner on an assumption that the relationship between Davis and Kaufman was well known in legal circles in the Third Circuit (169 Fed. (2d) 514 at 525 and at 539). The Court, in its opinion, failed to advert to the uncontradicted evidence that your petitioner, immediately upon engaging Kaufman brought him to see Mr. Stoughton and Mr. Stoughton and Mr. Kaufman thereafter cooperated in the case (Minutes, Vol. 8, p. 2537). If Kaufman's reputation in the Third Circuit at that time was as bad as the Circuit Court seems to believe, is it conceivable that Mr. Stoughton, acknowledged to be the dean of Philadelphia patent

bar, would have continued active and as counsel of record in your petitioner's case? If Mr. Stoughton and his associate, Mr. Farnum, continued in the case after the retention of Mr. Kaufman, it is far fetched to assume that the officers of your petitioner, who were laymen without previous litigation experience in the Third Circuit, should have known anything discreditable about Kaufman; or knowing it, would have paraded Kaufman before Stoughton.

In this case, a former judgment of the Court of Appeals is attacked on the ground that it was procured by fraud upon the Court and the other litigant. In such case, the fraud or wrongdoing must be shown by "clear and convincing proof". Or, as expressed in one of the cases:

> "Evidence must be clear, unequivocal and convincing and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."
>
> *McDonnell* v. *General News Bureau, Inc.*, 93 Fed. (2d) 898.
> *U. S.* v. *Maxwell Land Grant Co.*, 121 U. S. 325.

In the case of *Schneidermann* v. *U. S.*, 320 U. S. 118, in which the Government sought to set aside a certificate of naturalization on the ground that it was procured by fraud, the Court said, at page 125:

> "To set aside such a grant the evidence must be 'clear, unequivocal and convincing'—it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

This certificate of naturalization was referred to in that case as a judgment, which is exactly what it

was. The judgment in this case cannot be set aside on bare assumptions and equivocal inferences.

At this point, we can disregard the positive evidence given by the petitioner as to the very proper reasons for Kaufman's retention and can treat the case as though no such evidence had been given.

Still, the respondent has the burden of establishing all the facts necessary to prove that the petitioner had knowledge of Kaufman's influence over Judge Davis and that the petitioner hired Kaufman with the intent that he should use such intimacy with the Judge.

The result reached by the lower Court is erroneous, and it is essential, in the interests of Justice, that the writ of *certiorari* should issue and the record be reviewed by this Court.

POINT III.

This Court should review the important question of federal procedure arising out of the unprecedented action of the Circuit Court in (1) exercising original jurisdiction to hear and determine disputed facts, (2) disregarding the relief prayed for by the Singer Company and (3) changing the nature of the proceeding from a motion for reargument in a case between private litigants into an investigation by the Court of the integrity of certain ex-members, which is not a case or controversy under Article III, Section 2 of the Constitution.

Fortunately, matters of this kind have been rare. The procedure, we contend, has not been definitely settled. The Court should review the procedure adopted by the Circuit Court because of the following probable errors.

(1)

Unlike the case presented in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238, in which the facts were conceded, the vital facts here were controverted. The pivotal question in our case became the intent, whether vicious or innocent, of American Safety Table Co. in hiring Kaufman.

On that issue the Court took testimony, decided facts, and drew inferences from conflicting facts and finally issued the drastic order dismissing petitioner's complaint.

The Court of Appeals by statute has only appellate jurisdiction. It must be clear that in this instance the Court of Appeals has exercised all the powers of a Trial Court of first instance.

It is true that by judicial decision there has been engrafted on the statute an exception, to wit, that when necessary to aid or protect appellate jurisdiction, these Courts may exercise original jurisdiction. *United States* v. *Mayer,* 235 U. S. 55.

It might have been necessary, to protect appellate jurisdiction, for the Circuit Court to have decided the question of a reargument of the original appeal because essentially that question of reargument, it seems to us, is one of discretion upon which only an Appellate Court can pass. In that sense it might have been necessary for the Court to have done so here.

But the Circuit Court never passed on the question of reargument, and instead, on its own motion, entered upon an investigation and proceeded to decide controverted questions of fact and concluded by dismissing petitioner's complaint.

We contend that this procedure was not necessary

"in order to aid its appellate jurisdiction". If there had been any complaint by the Singer Company requiring the vacation of the judgment, that complaint could have been followed up in an appropriate action not requiring of necessity an investigation by the Circuit Court of Appeals.

In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, there were no disputed questions of fact; the facts establishing the fraud were admitted. It was not necessary there for the Appellate Court to exercise the powers of a trial court in passing on disputed factual issues.

The prevailing opinion in that case emphasizes that fraud had been shown without dispute. Preceding a statement of facts, the Court said:

> "The following facts were shown by the record without dispute" (p. 240).

And again, at page 247:

> "We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered."

This emphasis on the absence of any dispute as to the facts is probably the answer to the point raised in the dissenting opinion, wherein Justice Roberts said:

> "The Circuit Court of Appeals is without authority either to try the issues posed by the petition and answer on the affidavits on file, or, to

do as the dissenting judge below suggests, hold a full dress trial.

The federal courts have only such powers as are expressly conferred on them. Certain original jurisdiction is vested in this court by the Constitution. Its powers as an appellate court are those only which are given by statute. The circuit courts of appeal are creatures of statute. No original jurisdiction has been conferred on them" (p. 257).

In that case, where the facts were not in dispute, it may have seemed a senseless circuity of action to have referred the aggrieved party to the District Court rather than to permit the Circuit Court to clear its own records.

In our case, the Circuit Court committed probable error in following the *Hazel-Atlas* case, where the circumstances were entirely different and where it was called upon to decide disputed questions of fact.

Petitioner asks this Court to review the action of the Circuit Court for the purpose, among other things, of settling the important question of jurisdiction and procedure involved in this case and limiting the scope of the *Hazel-Atlas* case.

(2)

Unlike the proceeding in the *Hazel-Atlas* case (322 U. S. 238 at 239) which was based on a petition to the Circuit Court for leave to file a bill of review in the District Court, the proceeding in our case was, at its inception, merely an application by a defeated litigant for permission to re-argue the appeal.

That purpose was emphasized by the order of the

Circuit Court entered June 20, 1947, which called upon the petitioner to show cause why the mandate should not be recalled and the case returned to the argument list.

It is significant that the motion for reargument was never decided by the Circuit Court; it neither granted it nor denied it.

Instead of passing on the motion for reargument, the Court changed the direction of the proceeding and converted it into an investigation of the integrity of the bench and as a result of that investigation ordered the dismissal of the petitioner's complaint. Such disregard of the terms of the prayer for relief and the order to show cause ought to be reviewed.

(3)

The Constitution, Article III, Section 2, limits the judicial power of the federal courts to the decision of "cases or controversies".

At its inception, this proceeding may be called a "case" between two private litigants in which one asked for a specific remedy and the other resisted.

But as we have seen in the Statement of Facts (p. 6 herein), the Circuit Court did not consider itself bound by the limits thus prescribed, and on its own motion went outside those boundaries and entered upon an "investigation" required neither by the pleadings of the parties nor the relief asked. The pleadings did not allege any fraud or wrongdoing by your petitioner. Nevertheless, there has been an extensive investigation of that phase of the case and the Court has never directly decided petitioner's objection and its motion to dismiss Singer's petition and the rule to show cause of June 20, 1947. The pleadings did not demand relief beyond the granting

of a motion for reargument which even the Court recognized in its rule to show cause of June 20, 1947. Nevertheless, the Court has not decided the motion for reargument but rather, on its own motion and as a result solely of its "investigation" dismissed your petitioner's complaint. As a result, the proceeding in the Circuit Court can be "visualized" only as an investigation *pro bono publico* and had ceased to be a "case or controversy" between private litigants.

All of this procedure, which we claim as erroneous, was likewise unprecedented. The record should be examined and reviewed by this Court and a writ of *certiorari* should issue.

POINT IV.

The decision below adjudicates for the first time corruption on the part of a former judge of the Circuit Court and grave public importance of that decision, as well as its prejudicial effect on this petitioner, requires its review by this Court.

The Court below in this proceeding relied very strongly on alleged bribery of Davis by Kaufman and Fox in what is called the Fox transactions and also, on alleged bribery of Davis by Kaufman in what is called the Stokley transaction.

Neither of these matters concerns in any way the American Safety Table Company or its case against the Singer Sewing Machine Company; nor was any charge or effort made to connect American Safety Table Company with either of these transactions; but the alleged corruptibility of the Court seems to have weighed heavily with the Circuit Court in deciding our case.

In the Fox transactions, Davis and Kaufman were both indicted and tried twice and in each case the jury had disagreed (Opinion, 169 Fed. (2d) 514 at 517).

The Stokley transaction was examined by Special Master White and is referred to in his report, confirmation of which was subsequently withdrawn by the Circuit Court of Appeals after the criticism of the White report contained in the opinion of this Court reported at 320 U. S. 575 at 580.

Davis had died prior to the investigation in this case, and the only testimony given by him or on his behalf in this proceeding was the reading of his testimony taken before Special Master White.

The finding of the Circuit Court that there was corruption in the Stokley and Fox transactions is the first adjudication on that subject and should be reviewed by this Court.

CONCLUSION.

In order to secure to the petitioner the right to one review which has always been a part of our conception of just process and in view of the probable errors of the Circuit Court committed in this unprecedented proceeding, and to correct those errors, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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